No. [redacted] 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CLARIDGE APARTMENTS COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

Summary of Matter Involved.

The matter involved is the action of Tax Court of United States in finding the cost of the building in question was $385,326.37 instead of $424,609.19 as shown by uncontradicted documentary and oral evidence by credible and unimpeached witness and with no evidence whatever to support such reduction. This is in finding the basis of depreciation of a large apartment building of the taxpayer. This question was not decided by the United States Circuit Court of Appeals for the Seventh Circuit as it became moot because it reversed the Tax Court on other points but it will become a vital issue if the Supreme Court of the United States reverses that Court in companion Petition for writ of certiorari.

LIST OF AUTHORITIES CITED.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CLARIDGE APARTMENTS COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Claridge Apartments Company, a corporation, the petitioner in above entitled cause, by John E. Hughes, Walter Hamilton, Jesse Andrews and Cornelius E. Lombardi, its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit of date December 1, 1943, affirming the Tax Court of the United States in case No. 8296.

Summary and Short Statement of the Matter Involved.

On January 17, 1941, the Commissioner of Internal Revenue made a deficiency assessment against petitioner for $3,289.74 income taxes and $67.85 for excess profits for the years 1935 to 1938 inclusive (Rec. 7). The chief ground of the assessment was that the basis of depreciation for this period should be the fair market value of its large apartment building, on the date of its acquisition by the taxpayer, Aug. 1, 1935, or $132,500, instead of its cost, $424,609.19. The ground asserted was that petitioner was not the result of a taxfree reorganization (Rec. 9, 12, 15, 16, 18). Appeal was taken to the Board of Tax Appeals (Rec. 3). Just prior to trial this court handed down decisions in four important cases, bearing on the question which weakened Commissioner's case materially. Commissioner without amending his pleading, asserted orally at the trial he was relying on Section 270 of the Chandler Act for his position as well, that the fair market value of the building was the correct basis of depreciation (Rec. 23). Nothing was then asserted or claimed that defaulted interest had been taken as a tax benefit by petitioner's transferor on income tax reports.

Helvering v. Alabama Asphaltic Limestone Co., 315 U. S. 179;

Palm Springs Holding Corporation v. Commissioner, 315 U. S. 185;

Bondholders Committee, Marlborough Investment Co. v. Commissioner, 315 U. S. 189;

Helvering v. Southwest Consolidated Corporation, 315 U. S. 194.

The Tax Court of the United States found there was a tax free reorganization (Rec. 194) under Section 112. Section 270 of the Chandler Act was not retroactive but applies to this case as to income taxes for the year 1938.

that petitioner exchanged 2770 shares of its common stock of no par value in the reorganization for $277,000 face value of first mortgage bonds of its transferor which was insolvent and took title to all its property on Aug. 1, 1935; this was not a cancellation or reduction of debt within the meaning of Section 270 of the Chandler Act as the assets of the Company were still subject to a capital stock obligation (Rec. 198); that there was no evidence to support the finding that $80,022.20 of defaulted interest had been taken as a tax benefit by petitioner's transferor but it so found and deducted that sum from the cost of the building (Rec. 198); that the cost of the building was $385,326.37 instead of $424,609.19 (Rec. 184, 198), though the uncontradicted and unimpeached documentary and oral evidence, proved the latter sum and it had been asserted by the petitioner and its transferor without challenge in its income tax reports for 15 years; that the adjusted cost of the building on August 1, 1935 (Rec. 190) was $239,377.33 which finding arbitrarily changed the rate of depreciation from 1925 to 1935 without that point being at issue and with no evidence to support it (Rec. 190); and it disallowed $1,291.40 for painting and decorating, and $389.60 for repairs on the income tax report of 1937 on the ground it had previously been allowed in 1936. The testimony of Charles F. Henry that there had been no such duplication is uncontradicted. On appeal the commissioner admitted there was a tax free reorganization under Section 112 of Revenue Act of 1934 and relied wholly on Section 270 of the Chandler Act. The United States Circuit Court of Appeals for the Seventh Circuit on appeal from the Tax Court by the Commissioner in Case 8297 reversed it, holding Section 270 of the Chandler Act was retroactive and covered the years 1935 to 1938 inclusive, though the date it became in force was Sept. 22, 1938, and that exchange of $277,000 face value of first mortgage bonds in

this reorganization for 2770 shares of capital stock without par value in petitioner was a cancellation or reduction of indebtedness within the meaning of Section 270 of the Chandler Act; that the value of the stock received on August 1, 1935 was $45.00 per share, that the consequent reduction of the indebtedness was $55.00 per share or $152,350; this sum was below the fair market value of the building on May 14, 1935, the date the plan was approved, or $141,000. Therefore since the reduction or cancellation was more than the fair market value of the property, the latter, $141,000, should be the basis of depreciation in figuring the income taxes for 1935 to 1938 inclusive.

It then held moot the questions raised by petitioner in its appeal in Case 8296, except the question of alleged duplication of deductions for decorating and repairs for the year 1937 (Rec. 235, 231).

It found there was some evidence to support the Tax Court as to the latter and affirmed it. *It also affirmed the Tax Court on the other questions on the ground that they were moot but without deciding these questions on the merits* (Rec. 237).

The petitioner has filed a separate petition for certiorari to the Court covering the judgment of the Circuit Court of Appeals for the Seventh Circuit in reversing the Tax Court in Case 8297.

The questions held moot by the Circuit Court of Appeals for the Seventh Circuit were as follows:

(1) Whether the Tax Court of the United States erred as matter of law in finding the cost of the building in this case was $385,326.37 instead of $424,609.19, when the uncontradicted documentary evidence and oral evidence

proved the latter value, especially as that value was asserted by the taxpayer and its predecessor in title for 15 years in its income tax reports without challenge by the commissioner.

(2) Whether the Tax Court of the United States erred as a matter of law in finding that $80,122.20 defaulted interest was taken as an income tax benefit by the transferor of petitioner when the Tax Court admits there is no evidence to support such a finding, the question was not at issue by the pleadings, or evidence, and all the facts and circumstances showed such sum was not taken as such benefit.

(3) Whether the Tax Court of the United States erred as a matter of law in its finding that $239,377.33 was the correct adjusted basis for depreciation when that finding changed the rate of depreciation taken and allowed for 10 years by petitioner when that issue was not raised by the pleadings evidence or contention of the parties.

If the Court allows Petition for certiorari in regard to the Case 8297 and holds Section 270 of the Chandler Act has no application to a tax free reorganization as we claim then necessarily the Circuit Court of Appeals for the Seventh Circuit or this Court should decide the three alleged moot questions as in that case they would no longer be moot. It is submitted therefore that this petition should not be decided by this Court until it decides our Petition in Case No. 8297 and if it decides that petition in our favor, the Court should decide this petition or remand the case to the Circuit Court of Appeals for the Seventh Circuit to decide these three questions on the merits.

It is necessary for petitioner to file this petition because of the decision of the Circuit Court of Appeals in affirming

the Tax Court of the United States on these two questions which became moot in order to avoid a claim that we acquiesced in this decision.

Opinions Below.

The opinion of the Tax Court of the United States is found in 1 T. C. 163 (1943) (Rec. 183). The opinion of the Circuit Court of Appeals for the Seventh Circuit is found in 138 F. 2nd 962, (1943) and in (Rec. 228).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered Dec. 1, 1943 (Rec. 237), and the petition for rehearing was denied December 22, 1943 (Rec. 238). The jurisdiction of this Court is invoked under Section 240 (2) of the Judicial Code, as amended by Act of Feb. 13, 1925 (28 U. S. C. A. Section 347 a).

The Questions Presented.

(1) Did not the Circuit Court of Appeals for the Seventh Circuit err in affirming the Tax Court of the United States as a moot question in deducting $38,632.64 from the cost price of the building in this case of $424,609.19, without any evidence to support such action and in not holding that $424,609.19 was the cost price thereof when there was no proof produced to offset the documentary and unimpeached and uncontradicted parol evidence that such was the cost and such evidence is corroborated by its assertion in the income tax return of the transferor of petitioner the next year after it was built and for 14 succeeding years without challenge by the commissioner?

(2) Did not the Circuit Court of Appeals for the Seventh Circuit, err in not holding that the question of whether

the defaulted interest on the first mortgage bonds, amounting to $80,022.20 was taken as a tax benefit on income tax reports, and therefore to be deducted from the cost price of the building, was not at issue under the pleadings in the case, no evidence was introduced by either side in regard thereto and what evidence was in the case showed such interest was not taken as a tax benefit, and therefore the Tax Court of the United States committed error in deducting this sum from amount of the cost of the building in arriving at the basis of depreciation?

(3) Did not the Circuit Court of Appeals for the Seventh Circuit, err in not holding the Tax Court of the United States erred in holding a different rate of depreciation for the building of the taxpayer should be taken from 1925 to 1933, than that taken for 15 years without objection of commissioner when that point was not at issue in the case and no evidence was offered by either side?

(4) Did not the Circuit Court of Appeals for the Seventh Circuit err in not holding the Tax Court of the United States erred in not holding there was no evidence that items of painting and repairs taken in the 1937 return of the taxpayer were a duplication of 1936 deduction, and the only evidence was that there was no such duplication and it was uncontradicted.

Statutes and Regulations Involved.

The Statutes and Regulations involved are set forth in the Appendix.

Reasons relied on for the allowance of the writ of certiorari.

(1) The decision of the Circuit Court of Appeals for the 7th Circuit in affirming the Tax Court of the United States in this case on the ground the question was moot, as to whether commission of the builder was improperly disallowed as a part of the cost of the building becomes erroneous if certiorari is granted from the decision of the Circuit Court of Appeals for the Seventh Circuit reversing the Tax Court of the United States and the Court reverses such decision. Such finding is based on no evidence whatever and is contrary to the unimpeached, undisputed, documentary and oral evidence. Correctness of the cost claimed is further corroborated by its acceptance by the commissioner without question for 15 years from 1925 to 1940 in the income tax reports of petitioner and its transferor. It was error of law to make this deduction, and a denial of due process of law.

It is well known that among the American Bar, there is general dissatisfaction that government agencies tend to disregard legal rules and principles in making decisions. They should be guided by decisions of the Supreme Court of the United States. It is not due process of law within the meaning of the Federal Constitution to try cases without observing the law.

(2) The decision of the Circuit Court of the United States in deducting $80,022.20 defaulted interest on bonds from the cost price of the building is erroneous if the court decides with us in Case 8297. There was admittedly no evidence for such a finding because no evidence was offered to prove this interest was used as a tax benefit and the issue was not raised by the pleadings or urged by the Commissioner in the Tax Court of the United States.

(3) The Decision of the Circuit Court of Appeals for the 7th Circuit in not passing on the ruling of the Tax Court of the United States in changing the rate of depreciation on the cost of the building from that taken and allowed by the commissioner for 15 years is erroneous if the Petition for certiorari is decided in our favor in case No. 8297. This question was not at issue by the pleadings and no evidence was offered by either side on it.

(4) The decision of the Circuit Court of Appeals for the 7th Circuit in affirming the decision of the Tax Court of the United States in disallowing deductions for painting and repairs for the year 1937 is erroneous as unsupported by any evidence whatever.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this court on the date designated in said writ full and complete transcript of record of all proceedings in the case entitled *Claridge Apartments Company, an Illinois Corporation* v. *Commissioner of Internal Revenue*, No. 8296, to the end that said case may be reviewed and determined by this Court as provided by law and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

CLARIDGE APARTMENTS COMPANY, a corporation.

By JOHN E. HUGHES,
WALTER HAMILTON,
JESSE ANDREWS,
CORNELIUS E. LOMBARDI,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943 _____

CLARIDGE APARTMENTS COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The Petition of the Taxpayer prevailed in part and was overruled in part by the Tax Court. The opinion is found in 1 T. C. 163 (1943) and (Rec. 191).

The Commissioner prevailed in the Circuit Court of Appeals for the 7th Circuit. The opinion is found in 138 F. 2nd 962 (1943) and (Rec. 228).

Jurisdiction.

1. The jurisdiction of this Court is invested under Section 240 (a) of the Judicial Code as amended by Act of Feb. 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347 (a).

2. The date of the judgment of the Circuit Court of Appeals of the Seventh Circuit herein sought to be reviewed, is Dec. 1, 1943, and petition for rehearing was denied December 22, 1943.

Statement of the Case.

On January 17, 1941, the Commissioner made a deficiency assessment of income tax liability amounting to $3228.74 and $67.85 for excess profits taxes for the years 1935 to 1938 inclusive (Rec. 7).

The chief ground of assessment was that the basis of depreciation of taxpayer was the fair market value of the large apartment building of the taxpayer on Aug. 1, 1935 of $132,500 as it was not a tax free reorganization (Rec. 9, 12, 15, 16, 18). On April 11, 1941, the taxpayer filed petition for redetermination of this assessment before the Board of Tax Appeals (Rec. 3). The chief ground of the petition was that taxpayer was the result of a tax free reorganization and the cost of the building to the transferor company of $424,609.49 was the correct basis for depreciation (Rec. 3, par. 4 A. B. D.).

The commissioner denied this was the proper basis and asserted the fair market value on date of acquisition Aug. 1, 1935, was the correct basis, on the ground it was not a tax free reorganization (Rec. 21, par. 4 A. B. C., 9, 12, 15, 16, 18). Just before the case was tried this Court handed down four important decisions which made the

claims of the commissioner very thin. Consequently at the trial without amending the pleadings, counsel announced he was going to rely on Section 270 of the Chandler Act as well, for his contention that the fair market value of the building was the correct basis of depreciation.*

No claim was made orally or in writing that defaulted interest on 1st mortgage bonds was taken as a tax benefit by the taxpayer. The Tax Court found there was a tax free organization (Rec. 194); that section 270 did apply to the reorganization for the year 1938 and was not retroactive to the years 1935 to 1937 inclusive (Rec. 195, 196); that the words "cancelled or reduced", in Section 270 did not apply to an exchange of bonds for stock in a new company because the assets of the company were not freed from obligation but merely a capital stock liability was substituted for a debt obligation; that the cost of the building was $385,326.37 instead of $424,609.19, which had been taken as a basis of depreciation for 15 years (Rec. 184, 198); that there was no evidence in the record whether $80,022.20 of defaulted interest was taken as a tax benefit by the taxpayer and this question was not at issue in the case either by the pleadings or evidence, but it deducted this sum from the cost of the building as a basis for depreciation and arbitrarily changed the rate of depreciation from 1925 to 1935 without any evidence to guide it and without this being an issue in the case (Rec. 197). It also disallowed certain deductions for 1937 for repairs and painting without any evidence to support its finding.

The Circuit Court of Appeals for the Seventh Circuit, held Section 270 of the Chandler Act was retroactive and applied to the years 1935 to 1938 inclusive; that an ex-

*Helvering v. Alabama Asphaltic Limestone Co., 315 U. S. 179; Palm Springs Holding Corporation v. Commissioner, 315 U. S. 185; Bondholders Committee, Marlborough Investment Co. v. Commissioner, 315 U. S. 189; Helvering v. Southwest Consolidated Corporation, 315 U. S. 194.

change of bonds for stock was a cancellation within the meaning of Section 270 and the amount to be deducted from the cost of the building as adjusted was the difference between $277,000 face of the bonds, and the fair market value of the 2770 shares of stock received in exchange for the bonds; it found the fair market value was $45.00 per share. This deduction from the cost even of $424,609.19 as adjusted would bring the value of the building below $141,000, which was the market value of the building on May 14, 1935, the date the plan was approved. It held $141,000 should be taken as the basis of depreciation, as of May 14, 1935. It also affirmed the Tax Court of the United States in disallowing deductions of painting and repairs for 1937. It affirmed the Tax Court on the points appealed by the taxpayer in case No. 8296, and reversed the Tax Court in all points of the appeal in case No. 8297. In the Circuit Court of Appeals for the Seventh Circuit, the commissioner in his brief conceded it was a tax free reorganization within the meaning of Section 112 of the Internal Revenue Act of 1934.

The Claridge Building Corporation built a large apartment building in 1924 (Rec. 24, 25, 219). On March 25, 1925 it issued 1st mortgage bonds of $340,000 (Rec. 75). On Oct. 4, 1931 foreclosure proceedings were started for non payment of interest (Rec. 76). The principal amount of bonds then due were $277,000 (Rec. 76). A decree of sale was had (Rec. 76). Then a reorganization was had at the instance of 93 per cent of the bondholders and all the stockholders (Rec. 75) in 1933 proceedings whereby bondholders exchanged 277,000 face value of bonds for 2770 shares of stock of no par value in Claridge Apartments Company (Rec. 76). Stockholders of Claridge Building Corporation obtained 10 per cent or 308 shares of stock in Claridge Apartments Company (Rec. 77). All the pro-

erty of Claridge Building Corporation was transferred to Claridge Apartments Company (Rec. 77, Par. 1; Rec. 79, Par. 4 and (a) (b) (c) (d); Rec. 80, 40, 81, 182).

Assignment of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in affirming finding of Tax Court of the United States that the cost of the building in this case was $385,326.37 instead of $424,609.49 as the uncontradicted and unimpeached documentary and oral evidence showed.

2. The Circuit Court of Appeals for the Seventh Circuit erred in affirming judgment of the Tax Court of the United States deducting $80,022 defaulted interest from the cost price of the building in this case when there was no issue on this question in the pleadings or evidence and admittedly absolutely no evidence supports such a finding.

3. The Circuit Court of Appeals for the Seventh Circuit erred in affirming decision of the Tax Court of the United States, changing the rate of depreciation of the building in this case over a period of ten years that had been allowed by the commissioner, without the rate of depreciation for that time being an issue in the pleadings or evidence and no evidence of any kind supports such a finding.

4. The rulings of the Tax Court of the United States in (1), (2) and (3) of this assignment of errors denies to petitioner due process of law in violation of Article V of the Constitution of the United States.

5. The Circuit Court of Appeals for the Seventh Circuit erred in disallowing deductions for painting and repairs for the tax year of 1937 as the uncontradicted evidence showed these items were proper deductions.

ARGUMENT.

Summary.

I.

There was no evidence whatever warranting the Tax Court of the United States to reduce the cost of the building from $424,609.19 to $385,326.37.

(a) When there is absolutely no evidence in the record to support a finding of the Tax Court of the United States or no substantial evidence to support it, it is an error of law for the Tax Court of the United States to make this finding. There is no evidence in the record to support the finding that $385,326.37 was the cost of the building at 4501 Malden St., Chicago, Illinois.

P. C. Lawson & Co., Inc. v. Com., 82 Fed. Rep. (2d) 398 (C. C. A. 3rd Cir. 1937); p. 398.

Foster v. Com., 57 Fed. Rep. (2d) 516 (C. C. A. 5th Cir. 1932), p. 518.

Ox Fibre Brush Co. v. Blair, 32 Fed. Rep. (2d) 42 (C. C. A. 4th Cir. 1929), p. 44.

Nichols v. Com., 44 Fed. Rep. (2d) 157 (C. C. A. 3rd Cir. 1930), p. 159.

(b) When unimpeached documentary evidence and verbal testimony, uncontradicted, credible, and not improbable, are introduced, the Tax Court of the United States cannot disregard it but must accept it as true. The books of original entry and the testimony of Charles E. Hen[illegible] show the cost of the building at 4501 Malden St., Chica[illegible]

to be $424,609.19. They are unimpeached, the evidence is credible, and not improbable.

Boggs & Buhl, Inc. v. *Com.*, 34 Fed. Rep. (2d) 859 (C. C. A. 3rd Cir. 1929), pp. 860, 861.

Pittsburgh Hotel Co. v. *Com.*, 43 Fed. Rep. (2d) 345 (C. C. A. 3rd Cir. 1930), p. 347.

(c) The United States Government, though a sovereign, when it litigates with a private citizen is estopped to make assertions just as private individuals are estopped, when equity requires it. For 15 years petitioner and its predecessor, reported the cost of its building to be $424,609.19 in its income tax returns. For 15 years respondent accepted this valuation when he could have demanded proof. He is now estopped to question this valuation.

State of Illinois v. *I. C. C. R. Co.*, 246 Ill. 188 (1910), p. 248.

State of Indiana v. *Milk*, 14 Fed. Rep. 389 (C. C. D. Ind. 1882), pp. 396, 397.

U. S. v. *Wells*, 266 U. S. 328 (1924), p. 339.

Walker v. *U. S.*, 139 Fed. Rep. 409 (C. C. M. D. Ala. 1905), p. 412.

II.

A Court has jurisdiction to decide only the issues presented by the pleadings. It cannot decide issues not presented by the pleadings. The Tax Court of the United States erred in finding that $80,022.20 should be deducted from the cost price of the building as adjusted to find the basis for depreciation for income tax of 1938, on account of alleged use of defaulted interest on the bond issue by Claridge Building Corporation from 1931 to 1935 as provided in Section 270 of the Chandler Act because that issue was not presented by the pleadings in the case, no

evidence was taken thereon by either party, and the decision of the Tax Court of the United States is wholly unsupported by any evidence. All the evidence in the case was to the contrary. Furthermore no issue was raised by the pleadings or the evidence as to the proper rate of depreciation of the building from 1925 to 1935. The Tax Court of the United States arbitrarily, without any evidence to support it, found that the cost of the building as depreciated on August 1, 1935 was $239,377.33. The cost, using the original figure of $385,326.37 as found by the Court, and the rate of depreciation allowed by the commissioner for fifteen years would be $246,082.66.

Reynolds v. Stockton, 140 U. S. 254 (1891), pp. 264, 266, 268.

J. P. Jorgensen v. Rapp, 157 Fed. Rep. 732 (C. C. A. 9th Cir. 1907), p. 738.

Mumford v. Vail, 34 N. J. Law 418 (1871), p. 422.

III.

Insolvency once proved is presumed to continue until the contrary is shown. On Sept. 15, 1931, foreclosure proceedings were started against Claridge Building Corporation because of inability to pay interest on the first mortgage and taxes. From 1931 to August 1, 1935, no interest was paid on the first mortgage but the whole accrued sum of $80,022.20 remained unpaid. $13,000 of general real estate taxes remained unpaid during that period. Only $8,000 was accumulated by the receiver during that period. Nearly $13,000 per year of depreciation was allowable on its accounting. During all this time it was operated by Trustee Melvin L. Straus. The original presumption and these proved facts tend to show that it was not necessary to take credit for unpaid interest on income tax returns.

Cleage v. *Lardly*, 49 Fed. Rep. 436 (C. C. A. 8th Cir. 1906).

Adams v. *State*, 87 Ind. 573 (1882), p. 575.

Wachsmuth v. *Penn Mutual Life Ins. Co.*, 147 Ill. App. 510 (1909).

IV.

The law is that if the Commissioner of Internal Revenue makes a finding of fact on substantial evidence, and no evidence is adduced to overcome this, it stands.

Where, however, the Commissioner of Internal Revenue made no finding of fact on the subject, it is error for the Tax Court of the United States to make one for him arbitrarily without any evidence. This it did as to $80,022.20 deducted from basis of depreciation on account of supposed use of defaulted interest as tax benefit under Section 270 of Chandler Act. There is no presumption of fact in this regard in the absence of evidence. The presumption in favor of commissioner's finding is rebutted when the Tax Court makes a finding different from his.

City of Indianapolis v. *Keelen*, 167 Ind. 516, (1906), p. 527.

Andrews v. *Commissioner*, 135 Fed. Rep. (2d) 314 (C. C. A. 2nd Cir. 2-31-43), p. 318.

V.

The finding of the Tax Court of the United States that $1,291.44 of deegrating and $389.60 of repairs were charged in the returns of the taxpayer for both 1936 and 1937 is not supported by any substantial evidence and therefore should be reversed.

VI.

The action of the Tax Court of the United States in arbitrarily making findings of fact with absolutely no evidence to support it and contrary to uncontradicted and unimpeached documentary and oral evidence and making findings on issues not presented by the pleadings, the evidence and the claims of the commissioner, denies to petitioner due process of law in violation of Article V of the Federal Constitution.

12 Corpus Juris, pp. 1190, 1191.

ARGUMENT.

I.

It was an error of law for the Tax Court arbitrarily and with no evidence to support it, to find the cost price of the building was $385,326.37 instead of $424,609.19.

(a) Petitioner's Exhibit 2 is a book of original entry which showed in detail the cost of the building to be $424,609.19 (Rec. 219). Charles F. Henry, the builder, so testified and both are corroborated by that figure being reported in the income tax report of Claridge Building Corporation, the next year after the building was built, namely, 1925, and for 15 years thereafter without objection by the commissioner. This documentary evidence plus the uncontradicted, unimpeached oral evidence of Charles F. Henry renders the finding of the Tax Court error of law.

P. C. Tomson & Co., Inc. v. *Com.*, 82 Fed. Rep. (2d) 398 (C. C. A. 3rd Cir. 1935), p. 398.

Foster v. *Com.*, 57 Fed. Rep. (2d) 42 (C. C. A. 5th Cir. 1932), p. 518.

Ox Fibre Brush Co. v. *Blair*, 32 Fed. Rep. (2d) 42 (C. C. A. 4th Cir. 1929), p. 44.

Nichols v. *Com.*, 44 Fed. Rep. (2d) 157 (C. C. A. 3rd Cir. 1930).

(b) When unimpeached documentary evidence and verbal testimony is not contradicted, is credible and not improbable, the Tax Court cannot disregard it but must accept it as true.

Boggs & Buhl, Inc. v. *Com.*, 34 Fed. Rep. (2d) 859 (C. C. A. 3rd Cir. 1929), pp. 860, 861.
Pittsburgh Hotel Co. v. *Com.*, 43 Fed. Rep. 345 (C. C. A. 3rd Cir. 1930), p. 347.

(c) The United States Government though a Sovereign, when it litigates with a private citizen, is bound by all the equities that arise between litigating citizens including the equitable doctrine of estoppel. So it is estopped after accepting $424,609.19 for 15 years as the cost of this property as a basis for depreciation, in income tax reports to assert differently now.

State of Illinois v. *I. C. R. R. Co.*, 246 Ill. 188 (1910), p. 248.
State of Indiana v. *Milk*, 11 Fed. Rep. 389 (C. C. D. Ind. 1882), pp. 396, 398.
U. S. v. *Thelka*, 266 U. S. 328 (1924), p. 339.

II.

The Tax Court erred in deducting $80,022.20 from the cost of the building for the purpose of obtaining a basis for depreciation on the theory such defaulted bond interest of the transferor of the property was taken as a tax benefit. It admitted there was no evidence to support such a ruling (Rec. 197), and the question was not raised by the pleadings (Rec. 9, 12, 15, 16, 18, 3, Par. 4 (a), (b), (c), Rec. 21, Par. 4 (A to H), Rec. 197).

(a) A decision of a Court outside the issues raised is void.

Reynolds v. *Stockton*, 140 U. S. 254 (1891), pp. 264, 269, 268.
J. P. Jorgenson v. *Rapp*, 157 Fed. Rep. 732 (C. C. A. 9th Cir. 1907), p. 738.
Mandan v. *Taul*, 34 N. J. Law, 418 (1871), p. 4[illegible]

(b) Claridge Building Corporation, on Oct. 1, 1931 was in default in paying interest on its bond issue and taxes so that foreclosure was started (Rec. 76). At that time it had no need to take the benefit of defaulted interest on its income tax returns because it could not even pay taxes and it had nearly $13,000 it took as depreciation on its building (Rec. 93, 95). This condition once existing is presumed to continue in law especially as the depression lasted until 1935. During the period the defaulted interest was accumulating and it was in the hands of a Trustee all this time.

Cleage v. *Lardly*, 149 Fed. Rep. 346 (C. C. A. 8th Cir. 1906).

Adams v. *State*, 87 Ind. 573 (1882), p. 575.

Wachsmuth v. Penn Mutual Life Ins. Co., 147 Ill. App. 510 (1909).

III.

The Tax Court erred in changing the rate of depreciation of the building from 1925 to 1935 in arriving at the basis of depreciatiton, Aug. 1, 1935, as $239,377.33 (Rec. 190). If we used the cost price found by the tax court and the rate of depreciation of 3 per cent allowed for 15 years, the basis would be $246,082.66. If we use the cost price of $424,609.19 used for 15 years in income tax reports and the rate we used for 15 years, the basis on Aug. 1, 1935 would be $272,617.29 (Rec. 125).

IV.

The Tax Court erred in not allowing deductions for decorating of $1,291.44 and for repairs, $389.60 for the year 1937. All the evidence was for allowance and none to the contrary (Rec. 31, 32, 68, 71).

V.

The Tax Court of the United States violated the 5th Amendment of the Constitution of the United States giving to citizens the right of due process of law in thus deducting $38,532.64 from the cost of the building in finding the basis of depreciation, when the undisputed and unimpeached documentary and oral evidence was to the contrary and there was not a syllable of evidence to support its finding; it violated this Article of the Constitution in lopping off $80,022 from the cost price of the building on the theory a tax benefit had been taken for this amount by its transferor when that question was not at issue by the pleadings, evidence or contentions of counsel, and there is not a syllable of evidence to support this finding and all the reasonable probabilities are to the contrary; it violated the 5th Amendment to the Constitution in changing the rate of depreciation allowed for 10 years of 3 per cent without that action being in question in the case by pleadings, evidence, or contention of counsel. It violated this amendment in its ruling on the deductions for painting and repair where the uncontradicted evidence was to the contrary.

This violation of the Constitutional rights of the tax payer is so plain and palpable that extended citation of authorities is unnecessary. I merely quote 12 Corpus Juris, 1196, *et seq.*:

> "As applied to judicial proceedings, due process of law means a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial . . . a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. . . . the administration of equal laws according to established

rules, not violative of the fundamental principles of private right by a competent tribunal having jurisdiction of the case and proceeding on notice and hearing."

Respectfully submitted,

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APPENDIX.

Section 112 (g) (1) (B) of Income Tax Law of the United States for year 1934. 26 U. S. C. A. p. 695 (a) Definition of Reorganization as used in this Section and Section 113.

(1) The term "reorganization" means * * * (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock * * * of substantially all the properties of another corporation."

"Section 112 (g) (1) (D) (2). The term 'a party to a reorganization' includes * * * both corporations in the case of a reorganization resulting from the acquistion by one corporation of stock or properties of another."

Section 112. Reorganization of Gain or Loss. * * *

(b) Exchanges Solely in Kind. * * *

(3) Stock for Stock on Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same.—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanged property in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Transfer to Corporation Controlled by Transferror. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; * * *"

Section 113 (a) (6) Revenue Act of 1934 26 U. S. C. A. p. 697.

(6) Tax free exchanges generally. If the property was acquired after February 28, 1913, upon an exchange described in 112b to e inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the Taxpayer and increased in the amount of gain or decreased in the amount or loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted in Section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it."